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CHARLES BARTON BOLLFRASS

Plaintiff,

12 Civ. 6648 (LLS)

- against -

MEMORANDUM AND ORDER

WARNER MUSIC GROUP CORP.,

Defendant.  
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Plaintiff Charles Bollfrass alleges that a song published by defendant Warner Music Group Corp. ("Warner") infringes his copyright on his screenplay, in violation of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq, and that Warner has competed unfairly by distributing the infringing song. Defendant moves to dismiss Bollfrass' complaint, and for costs and attorney's fees.

On a motion to dismiss, the court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally," Rescuecom Corp. v. Google Inc., 562 F.3d 123, 127 (2d Cir. 2009), and should dismiss the complaint if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Copyright

The complaint alleges that "Panspermia/ExoGenesis," Bollfrass' screenplay, and "Exogenesis: Symphony," the song published by Warner,<sup>1</sup> are both stories of "(i) humanity's impending demise as a result of planetary breakdown, (ii) the use of astronauts and space travel to stave off humanity's demise by spreading human life to unpopulated planets, and (iii) the astronauts'/protagonists' realization that their actions are merely part of a larger cycle they have been predestined to undertake." Compl. ¶¶ 6, 12.

"Panspermia/ExoGenesis" is a screenplay for a "cinematic science fiction rock opera," see Compl. ¶ 5, that includes characters, dialog, plot development, and stage and camera instruction. The screenplay does not contain any music. See Reiner Decl. Ex. A.

"Exogenesis: Symphony" is a three-movement song. Although the online liner notes of "Exogenesis: Symphony" describe a story told by the song, the song lyrics are sparse and contain no discernible narrative. "Exogenesis: Symphony" has no dialog or characters. See Id. Ex. C.

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<sup>1</sup>Panspermia and exogenesis are related theories, not unique to these works, that life originated elsewhere in the universe and was spread to Earth, see Wikipedia, Panspermia, <http://en.wikipedia.org/wiki/Panspermia> (March 11, 2013, 16:35 EST).

To succeed in his copyright infringement claim, Bollfrass must show copying by Warner, see Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1976), which can be "proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works." Reyher, 533 F.2d at 90.

Whether any similarities between two works are protectible is a question of law that can be resolved on a motion to dismiss. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63-64 (2d Cir. 2010). "It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself." Reyher, 533 F.2d at 90, citing Mazer v. Stein, 347 U.S. 201, 217 (1954) and Baker v. Selden, 101 U.S. 99, 102-103 (1880). This axiom has been codified in section 102(b) of the Copyright Act, which provides that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102(b).

Bollfrass argues that "Exogenesis: Symphony" is substantially similar to "Panspermia/ExoGenesis" because the two

works have similar plots of planetary breakdown and the use of astronauts and space travel in the attempt to spread human life to other planets.

A plot may be afforded copyright protection without running afoul of the maxim that ideas are not copyrightable. See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931). But the infringement occurs only when the telling of the story - that is, the expression of the idea - is substantially similar to the expression of that idea in a protected work. Cf. Dymow v. Bolton, 11F.2d 690, 691 (2d Cir. 1926) ("[C]opyright law protects the means of expressing an idea; and it is as near the whole truth as generalization can usually reach that, if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist."). A similar plot does not infringe if the similarity is only at general levels of abstraction, because then it is the ideas that are similar, and not the way they are expressed:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer

Aping my soul  
You stole my overture  
Trapped in God's program  
Oh I can't escape  
Who are we?  
Where are we?  
When are we?  
Why are we?  
Who are we?  
Where are we?  
Why, why, why?  
I can't forgive you  
And I can't forget you  
Who are we?  
Where are we?  
When are we?  
Why are we in here?  
Who are we?  
Where are we?  
When are we?  
Why are we in here?

Exogenesis: Symphony Part 2 (Cross-Pollination)

Rise above the crowds  
And wade through toxic clouds  
Breach the outer sphere  
The edge of all our fears  
Rest with you  
We are counting on you  
It's up to you  
Spread, our codes to the stars  
You must rescue us all  
Tell us, tell us your final wish?  
Now we know you can never return  
Tell us, tell us your final wish?  
We will tell it to the world

Exogenesis: Symphony Part 3 (Redemption)

Let's start over again  
Why can't we start it over again  
Just let us start it over again  
And we'll be good  
This time we'll get it, get it right

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